No. 80-581

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

COMMONWEALTH EDISON CO., *et al.*,
Appellants,

v.

STATE OF MONTANA, *et al.*,
Appellees.

On Appeal from the Supreme Court of the State of Montana

BRIEF AMICUS CURIAE OF THE CROW TRIBE OF INDIANS

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INTEREST OF THE CROW TRIBE OF INDIANS

Amicus curiae, the Crow Tribe of Indians, is the beneficial owner of more than six billion tons of coal held in trust by the United States.

In an effort to alleviate the extreme poverty long endured by most of its members and to achieve some meaningful degree of economic and political self-sufficiency, the Crow Tribe has undertaken in recent years to develop some of that coal estate—its most valuable tribal resource and its only significant source of tribal income—pursuant to the Indian Mineral Leasing Act of 1938, as amended, 25 U.S.C. §§ 396a-396f (1976).

In 1975, the appellee State of Montana enacted a statute pursuant to which it imposed (i) a 30-percent severance tax on the production of and (ii) an additional gross proceeds tax on the sale of all coal produced within the exterior boundaries of the State of Montana—including that coal held in trust by the United States for the benefit of the Crow Tribe.

Because of the severe adverse impact of those Montana state taxes upon the Crow Tribe's attempt to develop its tribal trust property, the Tribe instituted legal action challenging the taxes in the United States District Court for the District of Montana in 1978.[1] Specifically, the Tribe and several of its members sought injunctive and declaratory relief against the imposition, assessment and collection of the Montana severance and gross proceeds taxes upon the development of Crow coal. It was—and is—the Tribe's contention that such enforcement of the challenged tax statute is unconstitutional and unlawful on each of several grounds.

The district court dismissed the Tribe's second amended complaint on April 4, 1979.[2] That dismissal has been appealed to the United States Court of Appeals for the Ninth Circuit; the matter is fully submitted to the court

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[1] *See* Second Amended Complaint for Injunctive and Declaratory Relief, *Crow Tribe of Indians* v. *State of Montana*, No. 78-110-BLG (D. Mont., filed August 31, 1978).

[2] The Tribe's second amended complaint set forth specific allegations as to the nature, operation and effect of the challenged state taxes. Those allegations, if proven, would entitle the Crow Tribe to the relief sought by its complaint. Without the benefit of any evidence, however, the district court summarily dismissed the Tribe's complaint, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, for failure to state a claim upon which relief may be granted.

of appeals, and a decision should be forthcoming at any time.[3]

The Crow Tribe's interest in the instant case arises from this Court's directive—set forth in conjunction with its noting probable jurisdiction herein—that: "The case is set for oral argument in tandem with consolidated cases No. 80-11, *Merrion* v. *Jicarilla Apache Tribe*, and No. 80-15, *Amoco Production Company* v. *Jicarilla Apache Tribe*." [4]

It is the concern of the Crow Tribe that this Court's consideration of the instant case, which involves a challenge to the Montana coal severance tax, "in tandem" with the *Jicarilla Apache* cases, which involve issues of Indian tribal sovereignty, could—unless the Court is made aware of the pendency and nature of the Crow Tribe's challenge to the Montana coal taxes—inadvertently affect the Tribe's own lawsuit.

SUMMARY OF ARGUMENT

The issues presented by the Crow Tribe's challenge to the Montana coal taxes have been carefully articulated and comprehensively treated by the parties before the Court of Appeals for the Ninth Circuit. That controversy is ready for disposition, on its own merits, by the court of appeals.

It is the purpose of this brief amicus curiae, therefore, to alert the Court to the pendency of that action; to

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[3] Oral argument was heard by a panel of the court of appeals on January 14, 1980. Pursuant to an order of the court of appeals, the parties submitted supplemental briefs, on or about August 1, 1980, addressing the decisions of this Court in *Washington* v. *Confederated Tribes of the Colville Indian Reservation*, 48 U.S.L.W. 4688 (June 10, 1980); *White Mountain Apache Tribe* v. *Bracker*, 48 U.S.L.W. 4897 (June 27, 1980); and *Central Machinery Co.* v. *Arizona Tax Comm'n*, 48 U.S.L.W. 4904 (June 27, 1980). *See* Order, *Crow Tribe of Indians* v. *State of Montana*, No. 79-4321 (9th Cir., filed July 14, 1980).

[4] 49 U.S.L.W. 3428 (December 9, 1980).

highlight the principal differences between that case, on the one hand, and the *Commonwealth Edison* and *Jicarilla Apache* cases, on the other; and to urge the Court to be sensitive to the importance of the *Crow* case and carefully restrict its "tandem" consideration of *Commonwealth Edison* and *Jicarilla Apache* to the precise facts and issues involved in those cases.

ARGUMENT

The issues presented for review by the Court of Appeals for the Ninth Circuit in the *Crow* case are the following:

> 1. Whether, in the absence of congressional authorization, the State of Montana may impose a 30-percent severance tax and an additional gross proceeds tax upon the production and sale of coal which is held in trust by the United States for the benefit of the Crow Tribe of Indians and which is developed under federal mining leases pursuant to the Mineral Leasing Act of 1938, 25 U.S.C. §§ 396a-396f (1976).
>
> 2. Whether, as a matter of law, there is no set of facts which might be proven, on the basis of which a court could conclude that the imposition, assessment and collection of the Montana severance and gross proceeds taxes upon the development and sale of Crow coal impair the right and ability of the Crow Tribe of Indians to govern itself, its lands and its people.
>
> 3. Whether, as a matter of law, there is no set of facts which might be proven, on the basis of which a court could conclude that the imposition, assessment and collection of the Montana severance and gross proceeds taxes upon the production and sale of Crow coal are pre-empted by (or interfere with) federal law or the Crow Tribe's own coal severance tax.

4. Whether the Enabling Act and Constitution of the State of Montana (which, respectively, contain a prohibition against and a disclaimer of state jurisdiction over any and all lands owned by Indians or Indian tribes) permit the State of Montana to impose a 30-percent severance tax and an additional gross proceeds tax upon the production and sale of coal which is held in trust by the United States for the benefit of the Crow Tribe of Indians and which is developed under federal mining leases pursuant to the Indian Mineral Leasing Act of 1938, 25 U.S.C. §§ 396a-396f (1976).[5]

Thus, with respect to each claim, the Crow Tribe's challenge to the Montana severance and gross proceeds taxes is based upon (i) the tribal trust nature of the Crow mineral estate, (ii) the Tribe's own status as a sovereign American Indian tribe and (iii) the federal government's control over and treatment of Indians and Indian lands.

The Montana state severance tax has also been challenged in the instant case—by utility company users of Montana coal and by companies which produce coal in Montana—on grounds entirely different from those involved in the *Crow* litigation. No issues of state jurisdiction over Indian tribal trust lands or of Indian tribal sovereignty are involved in this case.[6] However the Court rules in the instant case, therefore, the Crow Tribe urges the Court to restrict its consideration of the Montana state severance tax very carefully to the issues squarely presented herein—issues which do not in any way involve state taxation of *Indian mineral development pursuant to the Indian Mineral Leasing Act of 1938*, 25 U.S.C. §§ 396a-396f (1976).

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[5] Brief of Appellant at 1-2, *Crow Tribe of Indians* v. *State of Montana*, No. 79-4321 (9th Cir., filed July 23, 1979).

[6] For that reason, the Crow Tribe has not previously involved itself in this litigation. Indeed, even now, it takes no position on the merits of the arguments advanced to date by the parties herein.

The Crow Tribe urges the Court to be similarly cautious in its treatment of the *Jicarilla Apache* cases, which involve two separate challenges to the Jicarilla Tribe's right to impose its own tribal severance tax upon the production of tribal oil and gas held in trust by the United States.[7] Most significantly, the statute involved in the *Jicarilla Apache* cases is the Act of March 3, 1927, ch. 299, 44 Stat. 1347, 25 U.S.C. §§ 398a-398e (1976). That statute—unlike the Indian Mineral Leasing Act of 1938, pursuant to which Crow coal is produced—expressly authorizes state taxation of oil and gas production. Thus, whatever this Court rules in *Jicarilla Apache*, it should be mindful of this critically important distinction and avoid any unnecessarily sweeping declaratons concerning state taxation of Indian mineral development generally.

The *Crow* litigation, founded in fundamental precepts of American Indian law and federal Indian policy, is of absolutely critical importance to the Crow Tribe and its more than 6,000 members. Since their confinement to a reservation in southern Montana more than a century ago, the Crow people have derived meager economic sustenance by virtue of their ownership and use of farming and grazing lands on the reservation. Historically, and still today, the Crow people have suffered extremely high rates of unemployment and a very poor economic status. Throughout the last century, the Crow Tribe has been severely re-

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[7] The Crow Tribe's own severance tax was challenged in the district court in a counterclaim asserted by Westmoreland Resources, Inc. (a plaintiff-appellant in the instant case and an intervenor-defendant at the district court level in the *Crow* case). The Crow Tribe moved to dismiss that counterclaim on several grounds, and the district court has ordered proceedings on the Westmoreland counterclaim held in abeyance pending disposition of the principal controversy by the court of appeals.

stricted, by economic limitations, in its efforts to assist its people, provide for their welfare, and raise their standard of living. Because of these severe economic limitations, the Crow Tribe and its people have been highly dependent upon the federal government, both in terms of receiving financial aid and in terms of their own control over the management of their reservation and resources. Only in the last decade has the potential development of the Tribe's vast coal resources made economic and governmental self-sufficiency a realistic prospect rather than a dream for the Crow people.

The State of Montana's imposition of its severance and gross proceeds taxes has severely retarded the Tribe's production of its coal estate, impeded its economic and political development, and impaired its efforts to upgrade the quality of life on the Crow reservation. The Tribe's legal challenge to the continued imposition of those confiscatory taxes [8] deserves the full and careful consideration of any court before which it may come. Such consideration should be permitted to be undertaken unencumbered by any inadvertent precedent or dicta which might emanate from this Court's "tandem" consideration of *Commonwealth Edison* and *Jicarilla Apache* in the absence of full exposition of the issues presented in *Crow*.

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[8] Between 1975 and June of 1978, for example, the State exacted *more than $19.5 million in tax revenues* from the production of Crow coal—*more than three times* the less than $6 million which was paid in royalties to the Crow Tribe itself in the same period of time. *See* Memorandum Opinion and Order at 3, *Crow Tribe of Indians* v. *State of Montana*, No. 78-110-BLG (D. Mont., filed April 3, 1979). Those figures continue to escalate in the same proportion with the production of each ton of Crow tribal coal.

CONCLUSION

For the foregoing reasons, amicus curiae Crow Tribe of Indians urges the Court to be sensitive to the Tribe's interests as it undertakes to consider and dispose of the *Commonwealth Edison* and *Jicarilla Apache* cases.

Respectfully submitted,

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